TUN NAING OO

v.

PP

HIGH COURT MALAYA, SHAH ALAM
YEOH WEE SIAM JC
[CRIMINAL REVISION NO: 43-9-2009]
24 MARCH 2009

CRIMINAL PROCEDURE: *Revision - Sentence - Sentence of whipping imposed upon asylum-seeker in respect of an immigration offence - Offence not involving violence, brutality or threatening public order - Asylum-seeker not a habitual offender - Whether sentence of whipping manifestly excessive - Whether inhumane to impose whipping upon asylum-seekers or refugees*

CRIMINAL PROCEDURE: *Sentence - Whipping - Sentence of whipping imposed upon asylum-seeker in respect of an immigration offence - Offence not involving violence, brutality or threatening public order - Asylum-seeker not a habitual offender - Whether sentence of whipping manifestly excessive*

The applicant – an asylum-seeker from Myanmar – was arrested during an Immigration operation. At the material time, he was selling computer accessories to a customer in a shop selling and repairing computers and accessories. The applicant was without a passport at the time of arrest and had entered Malaysia without a valid pass. The applicant had registered himself with a community group – the Alliance of Chin Refugees, which was helping him with his claim for asylum with the UNCHR. The applicant was charged in the sessions court with an offence under s. 6(1)(c) of the Immigration Act 1959/1963 ('the Act'). He was convicted and sentenced to 100 days' imprisonment and two strokes of whipping. The applicant applied to the High Court for a revision of the sentence of whipping. The High Court had thus to determine: (i) whether the sentence of whipping was manifestly excessive; and (ii) whether the applicant ought to be spared whipping on humanitarian grounds.

Held (allowing the application):

(1) The sentence of whipping is reserved only for crimes involving violence and brutality. In the instant case, the sentence of two strokes of whipping was manifestly excessive as there was no evidence that the applicant was committing a crime of violence or involving brutality when he was arrested. At the time of his arrest, the applicant was engaged in a benign activity – selling computer accessories to a customer. The sentence of whipping ought therefore be revised and set aside. (paras 20, 21, 22, 23, 24 & 25)

(2) Asylum-seekers or refugees in Malaysia are still subject to Malaysia's domestic laws, including the Act. *Subramaniyam Subakaran v. PP* (refd). However, it is inhumane and serves no purpose to impose a sentence of whipping upon an asylum-seeker or refugee. If asylum-seekers or refugees: (a) have not committed acts of violence or brutality; (b) are not habitual offenders; or (c) have not threatened public order, they should not be punished with whipping. In order to avert future cases of whipping being imposed as a sentence for similar offences, asylum seekers or refugees ought to give documentary proof of their registration with their own community in Malaysia or with the UNCHR in Kuala Lumpur to satisfy the subordinate courts that they are genuine asylum-seekers or refugees waiting to be resettled. (paras 29, 30, 31, 32, 33 & 34)

Observation:

(1) The Attorney-General of Malaysia, ('the AG') has stated that the law does not make caning mandatory for convicted illegal immigrants. Those illegal immigrants convicted and sentenced to caning are those who have committed an offence repeatedly or those involved in crimes that threatened public order. Prosecution of illegal immigrants was not a priority for the authorities because if all the cases involving illegal immigrants were taken to court, the prisons would be filled. (para 26)

Case(s) referred to:

Jayanathan v. PP [1973] 2 MLJ 68 ***(refd)***

Kya Hliang & 10 Ors v. PP (Semakan Jenayah No (MT-1) 43-1-2009) (Unreported) ***(refd)***

Leong Kok Huat v. PP [1998] 4 CLJ 106 FC ***(refd)***

Mohamed Ali v. PP (Criminal Appeal No 7 of 1956) (Unreported) ***(refd)***

PP v. Man Ismail [1938] 1 LNS 54 ***(refd)***
PP v. Wahab [1964] 30 MLJ 265 ***(refd)***
Subramaniyam Subakaran v. PP [2007] 1 CLJ 470 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 31, 35, 36
Criminal Procedure Code, ss. 323, 324, 325, 326, 327
Immigration Act 1959/1963, s. 6(1)(c), (3)

For the applicant - Renuka T Balasubramaniam; M/s T Balasubramaniam
For the respondent - Tuan Ahmad Kamal Roslan DPP

Reported by Andrew Christopher Simon

JUDGMENT

Yeoh Wee Siam JC:

[1] On 20 March 2009 this court received a letter dated 17 March 2009 from Messrs T. Balasubramaniam, the advocates and solicitors for Tun Naing Oo, a Myannmar national ("the applicant"), informing the court that the applicant was sentenced by the Sessions Court, Semenyih, Selangor ("the Sessions Court") on 13 March 2009 for an offence under s. 6(1)(c) of the Immigration Act 1959/1963 to 100 days' imprisonment with effect from the date of arrest and two strokes of whipping.

[2] In the same letter, the applicant applied for a revision of the sentence for the following reasons:

1. the punishment of whipping is based on the discretion of the Court;

2. the Applicant is a refugee from Myanmar and has just been registered with the United Nations High Commissioner For Refugees ("UNHCR");

3. the Applicant is facing pressure and persecution in his own country which resulted in him running away. The sentence of whipping would only add to his sufferings.

[3] The applicant is applying to this court for the sentence of whipping to be set aside.

[4] Based on the initial merits of the case as disclosed above, the court allowed the applicant's application to be registered as a criminal application for revision case. This case is also the second application for revision that is registered with this court since the opening of the court in Petaling Jaya on 4 March 2009.

[5] The powers of the High Court for revision in respect of criminal proceedings and matters in the Subordinate Courts are provided in ss. 31, 35 and 36 of the Courts of Judicature Act 1964. Similar powers of revision are also provided in ss. 323 to 327 of Chapter XXXI of the Criminal Procedure Code (Act 593) as follows:

> **323. Powers to call for records of subordinate Courts**
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> (1) A Judge may call for and examine the record of any proceeding before any subordinate Criminal Court for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of that subordinate Court.
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> …
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> **324. Power to order further inquiry**
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> (1) On examining any record under section 323 or other wise, a Judge may direct the Magistrate to make, and the Magistrate shall make, further inquiry into any complaint which has been dismissed under section 135, or into the case of any accused person who has been discharged.
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> …
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> **325. Powers of Judge on revision**
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> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
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> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.
>
> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

326. Permission for parties to appear

No party has any right to be heard, either personally or by advocate, before a Judge when exercising his powers of revision:

Provided that the Judge may, if he thinks fit, when exercising such powers hear any party, either personally or by advocate, and that nothing in this section shall be deemed to affect subsection 325(2).

327. Orders on revision

When a case is revised under this Chaper by a Judge he shall certify his decision or order to the Court by which the finding, sentence or order revised was recorded or passed stating, where the finding, sentence or order has been varied, the grounds for such variation; and the Court to which the decision or order is so certified shall then make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith.

[6] On 24 March 2009 I received the record of proceedings which I had earlier called for, for the purpose of satisfying myself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the Sessions Court. The hearing of the application was heard on the same day.

[7] Ms. Renuka T. Balasubramaniam of Messrs. T. Balasubramaniam, appeared on behalf of the applicant. Tuan Ahmad Kamal bin Roslan, the Deputy Public Prosecutor ("DPP"), appeared on behalf of the Public Prosecutor, the respondent in this case.

[8] The court notes from the records that the applicant was charged in the Sessions Court on 13 March 2009 as follows:

Bahawa kamu pada 29.01.2009 jam lebih kurang 5.15 petang beralamat di Jayacom Information Sdn Bhd, 3-IT-18, 3rd Floor Plaza Low Yatt Off Jalan Bukit Bintang 55100 Kuala Lumpur dalam Daerah Dang Wangi dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur sebagai seorang bukan warganegara Malaysia didapati masuk tanpa suatu pas yang sah. Oleh itu kamu telah melanggar s. 6(1)(c) Akta Imigresen 1959/63 (Pindaan 2002) merupakan suatu kesalahan yang boleh dihukum di bawah Seksyen 6(3) Akta yang sama.

[9] During the hearing, Ms. Renuka submitted to this court that the punishment of whipping under s. 6(3) of the Immigration Act 1959/1963 ("the Act") is not mandatory because of the words used in the section ie, "shall also be liable".

[10] Section 6(3) of the Act provides as follows:

> Any person who contravenes subsection (1) shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding 5 years or to both, and shall also be liable to whipping of not more than six strokes.

[11] The DPP in his submissions also agreed that whipping is not mandatory under s. 6(3) of the Act. It is within the discretionary powers of the court to decide whether to impose whipping or otherwise.

[12] The court agrees with both learned counsel for the applicant and the DPP that "shall ... be liable" has been interpreted and decided in many cases that it is discretionary and not mandatory (see Harun J's decision in *PP v. Wahab* [1964] 30 MLJ 265, the Federal Court case of *Jayanathan v. PP* [1973] 2 MLJ 68, *PP v. Man b. Ismail* [1938] 1 LNS 54 and *Leong Kok Huat v. PP* [1998] 4 CLJ 106). Therefore, the punishment of whipping under s. 6(3) of the Act is entirely left to judicial discretion.

[13] The issue now is whether the applicant should be imposed with the punishment of two strokes of whipping in addition to the 100 days' imprisonment imposed on him by the Sessions Court.

[14] Ms. Renuka brought to the court's attention that the applicant is an asylum-seeker from Myanmar. He entered this country five months ago. He is of the Chin ethnic group and fled his home state when members of the military junta approached his home and came looking for him, alleging that he is a member of the rebel group. She stated that it is common knowledge in the applicant's village that persons detained by the military junta are never seen again. Based on a tip-off from the village headman, the applicant ran away and made his way to Malaysia.

[15] Ms. Renuka also informed the court that the applicant is registered with his own community group here ie, the Alliance of Chin Refugees ("ACR"). The whole process of registering with the UNHCR takes about two years, with several interviews. As a result, the first step an asylum-seeker does is to register with his community group which assists in processing his claims with the UNHCR. Since the applicant's detention, preliminary investigations have been carried out. At present it is clear that the applicant qualifies as a refugee but this has to be finalised with the UNHCR.

[16] Ms. Renuka submitted that the purpose of the application is therefore purely on humanitarian grounds.

[17] The DPP submitted that the only basis for this court to interfere with the decision of the Sessions Court is whether the sentence imposed is manifestly excessive. (see Federal Court case of *Bhandulananda Jayatilake v. Public Prosecutor*, Criminal Appeal No. 33 of 1981).

[18] The DPP also submitted that the next issue is whether the Sessions Court had erred in law when he imposed the two strokes of whipping. According to him, the notes of proceedings contain no evidence to show that the Sessions Court Judge had exercised his discretion inappropriately. In any case, the applicant did not produce any documents before the Sessions Court to support his claim that he is registered with the UNHCR. The DPP further submitted that it would be dangerous to allow a claim that one is a refugee by a mere allegation without documentary proof. This would set precedent for all other refugees to come to court and ask for the punishment of whipping to be set aside based on oral confessions or allegations that they are refugees registered with the UNHCR.

[19] While the court agrees fully with the learned DPP's submissions, the court decided to determine this application for revision based on the following two main questions:

(a) whether the punishment of whipping is manifestly excessive to render it incorrect, illegal or improper under section 323 of the Criminal Procedure Code; and

A (b) whether the Applicant should be spared the 2 strokes of whipping on humanitarian grounds for the reason that he is an asylum-seeker or a refugee.

[20] Regarding the first question (a) above, there is ample case law stating that the punishment of whipping is to be reserved only for crimes involving violence and brutalities (see *Kya Hliang and 10 Others v. PP*, Semakan Jenayah no. (MT-1) 43-1-2009, High Court Johor Bahru, and *Mohamed Ali v. Public Prosecutor* High Court Singapore, KL-Criminal Appeal No. 7 of 1956).

[21] In the present case, based on the facts as disclosed in the police report dated 29 January 2009 (P2), the court finds that the applicant was arrested during an operation, Ops Belanja, carried out by 7 Immigration officers at Plaza Low Yat, Kuala Lumpur. At the time of his arrest, the applicant was inside the shop, Jayacom Information Sdn. Bhd., which is carrying on the business of selling and repairing computers and accessories. The applicant was detained together with two other males from Myanmar and one female from Indonesia. The applicant was then selling computer accessories to a customer. He did not hold a passport at the time of his arrest.

[22] The facts show clearly that the applicant had entered Malaysia without a valid pass and therefore he had committed the offence for which he is charged.

[23] The court finds the punishment of 100 days' imprisonment imposed on the applicant by the Sessions Court under s. 6(3) of the Act appropriate and legal. In fact, the applicant accepts such punishment and is not even applying for a revision of the sentence.

[24] However, the court finds that the sentence of two strokes of whipping is manifestly excessive since there is no evidence that the applicant was committing a crime of violence or brutality at the time that he was arrested. There is no doubt that he was present in Malaysia illegally but he was not carrying out any violent act; he was merely selling computer accessories to a customer, a very benign activity.

[25] For this reason, the court is satisfied that the sentence of two strokes of whipping, being manifestly excessive, is therefore incorrect and improper and ought to be revised and set aside.

[26] Regarding the second question in (b) above, the court bears in mind the New Straits Times newspaper extract dated 14 February 2005 tendered by learned counsel for the applicant. There it was reported that the Honourable Attorney-General of Malaysia, Tan Sri Abdul Ghani Patail ("the AG") stated that the law does not make caning mandatory for convicted illegal immigrants. He said those found guilty and sentenced to caning by the court were among immigrants who had committed the offence repeatedly or had been involved in crimes that threatened public order. The AG said that Malaysia accorded humanitarian treatment to immigrants and exercised care, although the immigrants had committed an offence under the Immigration Act by entering the country illegally. He also said that prosecution was not a priority for the authorities because if all the cases involving thousands of detained immigrants were taken to court, the prisons would be filled.

[27] From the above press report, it is clear that the AG, as the Public Prosecutor of this country, is not pressing for the sentence of whipping under s. 6(3) of the Act unless the accused is a habitual offender or has been involved in crimes that threatened public order. In the present case, there is no evidence that the applicant is guilty of either or both of those two offences.

[28] Learned counsel for the applicant submitted that Malaysia is not a party to the Convention Relating to the Status of Refugees which was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, and which entered into force on 22 April 1954 ('the 1951 Convention"). Therefore, Malaysia has no obligations towards making local laws for the protection of refugees. However, Malaysia has permitted the UNHCR to maintain an office here for registering asylum seekers.

[29] The legal position for asylum seekers or refugees in Malaysia is that they are still subject to our domestic laws, including the Act (see *Subramaniyam Subakaran v. PP*, High Court Malaya Alor Star, [2007] 1 CLJ 470). Every refugee has duties to the country

A to which he finds himself, which requires him in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order (see art. 2 of the 1951 Convention, under "General Obligations").

B **[30]** The question now is how therefore should the applicant be sentenced by the court for the offence that he has committed.

[31] Ms. Shalini Pillay, Protection Assistant or Legal Officer at the UNHCR Kuala Lumpur office, in her capacity as *amicus curiae*, informed the court that the UNHCR got to know of the applicant because he was registered with his own community which informed the UNHCR of his arrest. She stated that the UNHCR would like to schedule a full interview with the applicant to see the merits of his claim with UNHCR and to find a durable solution for him, which includes resettlement. Ms. Shalini also asked for the court's indulgence in setting aside the whipping on humanitarian grounds.

[32] Ms. Renuka then informed the court that she is being instructed by the UNHCR.

E **[33]** Going by humanitarian grounds, it is not humane to give an asylum-seeker or refugee two strokes of whipping. Such person is already running away from his own country to avoid pressure and persecution. It serves no purpose to whip him and add to his suffering when, as learned counsel for the applicant stated, after serving his sentence of imprisonment, the applicant would be deported. In any event, the UNHCR is now seeking to assist the applicant and finally to get him resettled in a suitable country.

[34] This court is therefore of the firm opinion that asylum-seekers and refugees, if they have not committed acts of violence or brutality, or are habitual offenders, or have threatened our public order, should not be punished with whipping. However, such persons can help themselves by giving documentary proof of their registration with their own community here or with the UNHCR office in Kuala Lumpur to satisfy the subordinate courts that they are genuine asylum-seekers or refugees who are only waiting to be resettled. That would, hopefully, avert future cases of whipping being imposed as a sentence for similar offences.

[35] For the above reasons, I exercised my powers of revision under the above sections of the Courts of Judicature Act 1964 and the Criminal Procedure Code, and accordingly set aside the sentence of two strokes of whipping on the applicant. However, the sentence of 100 days' imprisonment remains.

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